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BEFORE THE UNITED STATES DEPARTMENT OF AGRICULTURE

2000 JUL 19 P 12: 06

In the Matter of  
  
MILK IN THE NORTHEAST AND  
OTHER MARKETING AREAS  
  
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DOCKET NO. AO-14-A69, et al.  
DA-00-03

**MOTION TO STRIKE TESTIMONY CONCERNING MAKE ALLOWANCES VALUES  
AS TESTIFIED BY DR. ROBERT YONKERS**

This Motion, pursuant to 7 C.F.R. §900.7 is made on behalf of the following cooperatives: Select Milk Producers, Inc., Continental Dairy Products, Inc., Elite Milk Producers, Inc., and trade groups: Western States Dairy Producers Trade Association, Dairy Producers of New Mexico, Texas Association of Dairymen, Milk Producers Council (California), California Dairy Campaign, Western United Dairymen (California), Idaho Dairymen's Association, Utah Dairymen's Association.

Select, WSDPTA and the other supporting dairy producer organizations move to strike those portions of the testimony of Dr. Robert Yonkers in his direct testimony, cross examination, and accompanying exhibits that speak to the manufacturing costs of various products as compiled by NCI. This study is generally discussed at pages 288-293 and Exhibit 14. This written Motion is further support of an oral motion made by Benjamin F. Yale on behalf of the above named organizations and cooperatives on the final day of hearing testimony. 7 C.F.R. §900.8(d)(2). A record of that oral motion can be found in the Hearing Transcript beginning on page 1777. The Motion was denied at page 1783.

Careful review of the hearing transcript only reinforces the appropriateness of an order to

strike this testimony. From the beginning it should be noted that this is important testimony that goes to the heart of the FMMOs' minimum pricing requirements and this hearing itself. A change of one cent in the overall make allowances for manufacturing products will translate into \$100 million dollars a year in changes to producers under minimum pricing.

Dr. Yonkers testified on behalf of the National Cheese Institute (NCI) concerning cost of manufacturing surveys conducted by NCI. Yonkers throughout his cross examination, other hearing participants questioned Dr. Yonkers concerning the underlying data to support his statements as regards to NCI numbers. Without exception, when addressing specific questions Dr. Yonkers replied that he personally did not have information or data to support his statements.

In summary, Dr. Yonkers testified to prices compiled by NCI in a special study done expressly for this hearing. He did not prepare the information or collect it. All he did was report numbers someone else, unknown and unavailable, did prepare. He refused to confirm any numbers, explain numbers, or give any specific examples because, by his own admissions, he did not know. Simply stated his repeated promises that others would so testify to those matters were not kept.

First, as to the members who were promised to testify, only two cheese plants presented any testimony. Second, of those who did, both refused to disclose any information because of "proprietary" information.

The problem is that this refusal to provide information was known ahead of time. As Dr. Yonkers repeatedly promised testimony he knew that the letter sent to prospective participants promised absolute "attorney-client" privilege. Exhibit 53 attached. This letter which would have disclosed that the promises of subsequent testimony were empty was itself delayed in presentation until the very end of the hearing after all of the witnesses had long since testified and left.

For example, when asked by Attorney Marvin Beshore about supporting price relationships,

the following exchange took place:

- 13 Q Well, have you calculated what price relationships  
14 there would need to be in the marketplace for the  
15 substitutions for which you are concerned would take place?  
16 A Yes, we have looked at that and **I do not have**  
17 **those numbers with me.**

Yonkers cross, 358 [Emphasis added].

And again in a response to a question by Mr. Beshore at page 364:

- 17 Q Do you know where the plants are located  
18 regionally?  
19 A **I don't have that data at this time.**

Yonkers Cross 364.

Similarly, at page 422, Attorney Doug Marshall inquired about Dr. Yonkers' personal knowledge of the data, as follows:

- 13 Well, no. Maybe I'll start by asking if I  
14 understand how the survey was compiled. You personally as  
15 you testified were not involved in the compilation. You  
16 sent out a survey form to plants and that data were compiled  
17 by a third party. Is that correct?  
18 A That's correct.  
19 Q **So do you have any personal knowledge of, for**  
20 **example, the — any data that isn't in what is included in**  
21 **Exhibit 14 about, for example, the ranges of rates or the**

**22 deviation within various categories?**

**23 A No, I do not.**

Yonkers Cross 422 [Emphasis added]

Again, he indicated he had no knowledge such as Dr. Ling provided in cross examination.

15 Q At this hearing. All right. With -- I believe I

16 have asked this question. But just to make sure, we heard

17 from Dr. Ling a rather astonishing range of costs within his

18 survey. **Do you have any information about what the range of**

**19 total costs --**

**20 A We did not have the range of total costs reported**

**21 to us.**

Yonkers Cross 426.

What is clearly demonstrated by the hearing transcript is that Dr. Yonkers had no personal knowledge of the data in the study. When questioned, he was unable to personally provide any evidence or statistics in support of his statements.

Further, throughout his testimony, Dr. Yonkers stated in response to questions by numerous attorneys and other interested parties that individual members of NCI would be available to testify and provide actual or supporting data for his statements. This did not occur despite his repeated promises.

For example, when questioned by Attorney Marvin Beshore, Dr. Yonkers testified that others would testify to fill in the gaps he had created:

18 Q Okay. So you really are not ready to tell us what

19 price relationships would have to be out there for that to

20 occur. But you have advocated changing the differential

21 because you say it will occur.

22 **A Well, we will also have members testifying later**

23 **in this hearing who actually process Class II products who**

24 **will testify to that.**

Yonkers Cross 351. [Emphasis added]

A similar exchange occurred at page 361:

I don't

2 know. But if they were, how would they allocate according

3 to your instructions the overhead of Kraft's corporate

4 structure to their cheese plants. at a -- to their cheese

5 production at a given plant location?

6 **A I am going to defer to our members who will be**

7 **testifying later who participate in the survey about how**

8 they did that and let them testify to that.

Yonkers Cross 361 [Emphasis added].

Another example is found at page 366:

14 Q Well, it costs -- you know, you need plant

15 overhead of 3.37 cents per pound of whey versus, you know,

16 1.9 cents in the California survey for cheese. Apparently,

17 you need a lot more plant overhead to make whey than you do

18 to make cheese. Isn't that what your survey showed?

19 **A And we will have members testifying specifically**

20 to operations of whey plants versus cheese plants -- or the  
21 whey operations versus cheese operations later.

More examples are found at pages 443 and 461 as evidenced by the excerpts below:

1 Q Okay. I do intend to follow up if you have

2 individual representatives here.

3 A Okay.

4 Q I intend to ask them relative to they report all

5 of their information for all of their plants. And if they

6 didn't, well how did they select the plants that they chose

7 to include.

Yonkers Cross 436

There is a cost associated with

7 coordinating milk assembly and timely delivery to the plant.

8 If that is paid in the form of an over-order premium, it is

9 not your milk procurement costs. It is part of your cost of

10 milk. It is in -- we are looking for the non-milk costs in

11 this plant. **How individual members responded to the survey**

12 on this issue, I think you will have to ask them when they

13 are up here testifying.

Yonkers Cross 443 [Emphasis added]

1 will have some testimony later from others who will testify

2 that that 40-pound block price is much closer -- excuse me,

3 40-pound block moisture is 38 percent. So per pound of dry

4 matter, that three-cent difference is much less per pound of  
5 dry matter in the cheese because of that moisture  
6 adjustment.

7 Q So what is the difference in the cost of -- for  
8 the manufacturing costs in barrels and blocks?

9 A Well, in my example, what I went through is  
10 looking at the --

11 Q I didn't see anything about manufacturing costs  
12 with respect to barrels and blocks in your example.

13 A I don't have any data on the difference in  
14 manufacturing costs between the two.

15 Q Okay. So you don't know what the difference --  
16 okay.

17 A But I believe some others may be testifying later  
18 on that fact, yes.

19 Q Okay. How many of the ten firms in your study  
20 will we be hearing from in the subsequent testimony? You  
21 have deferred to their information a number of times. How  
22 many firms were you referring to?

23 A At least two will be testifying and perhaps more.

Yonkers Cross 461 [Emphasis added]

So pervasive was the reference to others testifying that at the close of Yonkers testimony,  
Judge Hunt thought that there were witnesses about to take the stand. Transcript 476.

Dr. Yonkers also promised to provide data including a regional breakdown of where the cheese plants surveyed were located as follows:

4 A I guess I am not -- I don't understand what you  
5 are asking. Would you like a regional breakout of where the  
6 plants were located?

7 Q As Dr. Ling provided, **can you provide that?**

8 A I believe so.

Yonkers Cross 365 [Emphasis added]

In addition to the information on the firm names, Dr. Yonkers promised to provide the cover letter sent to plants with the survey as indicated at page 359. He met these last two promises but only in the closing minutes of the hearing.

The inability to cross examine the witness on the underlying data is not harmless. After all IDFA's counsel repeatedly questioned Dr. Ling and others about the significance of a weighted average being higher than a simple average. In short, he used his cross examination of Dr. Ling to uncover what he thought was questionable and used the hearing to develop a record on that issue. Others responded. That is what an open hearing is about. The NCI study does not provide the participants that opportunity.

IDFA's counsel also pointed out an error to Exhibit 25 requiring a resubmission with a corrected number. Had Vanden Heuvel been able to testify about numbers someone else computed without any explanation, the participants would have been denied the chance to properly cross examine and develop the record.

Yonkers states that though anxious to be one of the first witnesses to testify on Monday,

Yonkers did not take the stand again until the last of the hearing, long after the data provided was true or untrue.

The NCI manufacturing cost survey included ten firms, namely: Glambia Foods, Alto Dairy, Jerome Cheese Company, Yowega Milk Products [sic], Tillamook County Creamery, Sorrento, Valley Queen Cheese, Kraft Foods, Foremost Farms, and Land O'Lakes. Of those ten firms, representatives from only three testified-- Glambia Foods, Kraft Foods and Land O'Lakes. A representative from Leprino also testified on the issue of dry whey. *None were willing to provide exact numbers that Dr. Yonkers indicated would be provided.* For example, at page 1088, Mr. Reinke, testifying on behalf of Kraft Foods refused to provide requested details as follows:

5 Q Do any of the contracts that Kraft has with plants

6 from which it buys cheese refer to CME prices as a factor in

7 establishing the price?

8 A I think our pricing is proprietary. I won't

9 answer that.

Similarly, when Mr. Williams testified on behalf of Glambia Foods, he indicated that he would not divulge "proprietary" information as indicated by his testimony at page 1301:

13 Obviously for competitive reasons I'm not at

14 liberty to divulge what our specific manufacturing costs

15 were, however, I can confirm that from the perspective of my

16 company the survey was taken with great seriousness and

17 attention, and I am confident we succeeded in providing

18 accurate figures.

Land O'Lakes' testimony is of no value because it was part of the RCBS studies.

The seriousness of leaving this testimony cannot be overstated. Courts have stopped implementation of orders that were predicated upon speculation and hearsay. Use of the NCI data creates the same risk.

The very integrity of any finding by the Secretary as to make allowances demands that it be based upon evidence that was truly subjected to cross examination and complete disclosure. As will be more fully explained later, the IDFA, intentionally or otherwise, presented evidence on the expressed predicate that the facts behind the numbers could be explored in cross examination with other, subsequent witnesses. Though this promise was made early in the hearing, IDFA did not disclose the names of the participants until the end of the hearing on Friday evening. Those parties who did participate in the hearing, did not provide the promised data. Since the NCI study was not properly subjected to the formal hearing process, the Secretary must refuse to consider it in establishing make allowances.

This will not be the last hearing on make allowances. The very nature of the pricing formula and the ever changing economics of scale and other related factors will render the make allowances established in this hearing obsolete and less reliable. As the first hearing it is absolutely essential that the Secretary establish some minimum guidelines on what evidence he will consider for setting these prices. These should include the simple, courteous, requirement that whoever compiles a set of numbers or argues for a price must present evidence in support of that allowance and be in a position to explain the numbers and their formulation.

This is not that difficult. Dr. Ling was available for extended cross examination on the RCBS study. DFA and other manufacturing cooperatives, put witnesses on to mention their exact costs. NCI did not come close to making the information subject to cross examination. It is unfair to those who did disclose the information that others got by without such candor. It is also unfair

to the producers in the FMMO who will be harmed by the effect of admitting such evidence.

For these reasons, those portions of Dr. Yonkers' testimony referencing the NCI surveys should be stricken from the record and removed from further consideration by the Department.

Respectfully submitted,  
BENJAMIN F. YALE & ASSOC. CO., LPA

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CERTIFICATE OF SERVICE

I hereby certify that an accurate photostatic copy of the foregoing was served upon the following this  1  day of July, 2000, by ordinary United States Mail service, postage prepaid.

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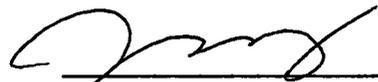
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UNITED STATES DEPARTMENT OF AGRICULTURE JUL 31 P 4: 00

BEFORE THE SECRETARY OF AGRICULTURE

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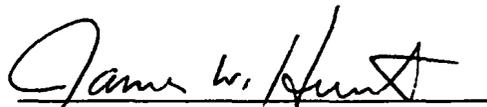
In re:	)	Docket Nos. AO-14-A69, <i>et al.</i> ; DA-00-03
	)	
Milk in the Northeast and	)	
Other Marketing Areas	)	
	)	

**Order Denying Motion to Strike Testimony**

Select Milk Producers, Inc.; Continental Dairy Products, Inc.; Elite Milk Producers, Inc.; Western States Dairy Producers Trade Association; Dairy Producers of New Mexico; Texas Association of Dairymen; Milk Producers Council (California); California Dairy Campaign; Western United Dairymen (California); Idaho Dairymen's Association; and Utah Dairymen's Association jointly move to strike the testimony of Dr. Robert Yonkers. A motion to strike his testimony at the hearing on the grounds of hearsay was denied. The instant motion contends that Dr. Yonkers' testimony contained in Exhibit 14 and pages 288-293 of the hearing transcript should be stricken on the grounds that it was allegedly based on hearsay and speculation and that he failed to provide names of additional witnesses and information in support of his testimony.

These arguments go to the reliability of Dr. Yonkers' testimony and the weight it should be accorded and not to its admissibility. As Dr. Yonkers' testimony was subject to cross-examination, as provided in 7 C.F.R. § 900.8(c)(2)(d)(1), the motion to strike his testimony is denied.

July 31, 2000



JAMES W. HUNT  
Administrative Law Judge